IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1062

UNITED STATES OF AMERICA,

Respondent,

v.

RONALD GIGLIOTTI,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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The petitioner, Ronald Gigliotti, respectfully requests that a writ of certiorari be issued to review the judgment and order of the United States Court of Appeals for the Second Circuit entered on December 8, 1975.

OPINIONS BELOW

A jury at the Unites States District Court for the Eastern District of New Youk, entered a verdict of guilty against petitioner in reference to the charge stemming from 18 U.S.C. §894. Judgment was entered on August 29, 1975. An appeal was taken to the U.S.

Court of Appeals for the Second Circuit and on December 8, 1975, the Court affirmed the judgment below from the bench.[1] Appellant counsel was notified to petition for writ of certiorari to the United States Supreme Court and failed to do so in a timely fashion. On Thursday, January 8, 1976, petitioner's counsel filed an application for an extension of time in which to file a petition for writ of certiorari. On January 12, 1976, Mr. Justice Marshall denied said application for being "out of time". Petitioner is presently on a $10,000 bond pending the resolution of this petition.

JURISDICTION

This Court has jurisdiction despite the failure of petitioner to file within the prescribed thirty days pursuant to *Schacht v. United States*, 394 U.S. 58, 63; see also *Heflin v United States*, 358 U.S. 415, p. 418 (n.7) and because petitioner herein concedes that there is nothing left to be tried in any further proceedings. See *Mills v. Alabama*, 384 U.S. 214; 28 U.S.C. § 1257.

QUESTIONS PRESENTED

1. Whether the trial court committed reversible error in failing to *sua sponte* sever petitioner from trial with the co-defendant Riccardi or at the very least petitioner was denied effective assistance of counsel by his counsel's failure to properly raise the severance issue?

2. Whether the Government's Grand Jury presentation of its case against petitioner Gigliotti was

[1] A copy of said order is a part of Petitioner's Motion For Extension of Time filed with this Court on January 8, 1976.

insufficient to warrant a finding of probable cause to indict?

3. Whether the deliberate elicitation by the prosecutor from the F.B.I. agent that said agent was specially detailed to Organized Crime cases caused the petitioner to be tried unfairly?

4. Whether there was sufficient evidence to sustain petitioner's case to go to the jury?

5. Whether the United States Court of Appeals for the Second Circuit erred when it required appellant to make oral argument on Monday, December 8, 1975, without the benefit of filing a reply brief to the Government's brief which was received for the first time by appellant counsel on Friday afternoon, December 5, 1975?

STATEMENT OF FACTS

Petitioner Gigliotti and his co-defendant, Ciro Riccardi, were charged with making extortionate loans to Frank DiPalma in violation of 18 U.S.C. §892 and with one count of using extortionate means to collect a debt from Mr. DiPalma, in violation of 18 U.S.C. § 894. Both defendants were acquitted of all but the one count charging a violation of 18 U.S.C. §894.

The first witness was Sgt. James Oleska, a New York City police officer attached to the District Attorney's office in Brooklyn. He testified that after DiPalma saw him in the office, he spent the night at DiPalma's house. At about 11:00 P.M. there was a loud pounding on the door and three men were heard yelling outside (Tr. 34*), but the witness could not identify any of the people involved (35-36). The next day he turned DiPalma over to the F.B.I. (42).

On cross examination it was established that Officer Oleska made no entries in his memorandum book or other reports which in any way described or told of the incident that occurred in DiPalma's house, wherein the men tried to gain entrance. The officer admitted that he had not put this in, even though he considered it an important aspect of the case, important enough for him to call for a back-up team to stay outside the house. (48-49) He also did not try to obtain the license plate number of the car and could not identify either defendant.

The next witness was ARTHUR RUFFELS, who said that he was an F.B.I. agent assigned to the *Organized Crime Division*. (22) There was strenuous objection to this characterization by the defense attorneys, but a motion for a mistrial was denied. (22) After extensive argument in which it was pointed out that such a characterization placed the idea in the jury's mind that the defendant had organized crime or Mafia links, the only action that the Court took was to charge the jury that the section to which an agent was assigned was immaterial. (25A-26)

The agent testified that he met DiPalma in the Rackets Bureau office of the Brooklyn District Attorney's office, where he took a written statement and opened an F.B.I. file. (85-86) He was allowed to say, over objection, that he arranged protection for DiPalma (87-89). The witness said that on June 2, 1972 he placed a body transmitter on DiPalma and took him to Avenue X and McDonald Avenue. (94-95) He remained in the automobile with a camera and recording equipment and DiPalma met with two men. Photographs were introduced. The objection was made that this entire transaction was beyond the scope of the

indictment because it occurred on June 2, 1972, (98-100) and the indictment alleged in both counts that the action occurred between May 1, 1971 and May 18, 1972. Ruffels identified the cassette recording of the conversations, a transcript of the tape and the tape was played for the jury, who were also given copies of transcript. The jury was told that the recording was evidence rather than the transcript. However, the tape did not work at the time and FRANK DiPALMA, the main witness, was called prior to the actual playing of the recording.

He said that he was a car cleaner with the New York City Transit Authority and had been a bookmaker from 1970 to 1972, a period of two years. (Tr. 16) He identified the defendant, CIRO RICCARDI, and said that he needed money and was taken by someone to see Riccardi, where he requested a loan of $1,000.00. (19-20) Petitioner supposedly said that he would give him the money the following Friday. The next week, the witness came back, received the $1,000.00, and the agreement was that he would have to pay $50.00 interest per week over the principal sum. That means that the following week $1,050.00 would be due and he would be paying $50.00 a week until he paid back the $1,000.00. (20-22) DiPalma said he paid $50.00 a week for months and then borrowed an additional $1,500.00 more from the appellant. Appellant then told him that the interest, or "vig" would be 125.00 per week from then on, and DiPalma agreed to that sum. (23) At that point the interest he had already paid came to about $1,000.00 for the previous three month period. DiPalma said he paid the $125.00 amount for approximately five or six months when he needed another $1,000.00, and saw Riccardi again. At

that point the meeting took place in a Lincoln automobile, and a few days later he got the additional money, and the interest ran to $175.00 per week. (28). The total principal debt at that time was $3,500.00.

DiPalma said his financial condition was very bad. He described himself as a degenerate gambler and said he owed approximately $12,000.00 or $13,000.00. (27) He made a salary of $140.00 per week (28) and said he was able to pay the $175.00 for approximately four or five months. (29) There came a time in late 1972 or early 1973 when he could not pay any more because he did not have the funds. (34) He went to see Riccardi at the motorcycle shop where they had met before and Riccardi offered to reduce the amount to $150.00 a week. The witness allegedly said it would still be too hard, and Riccardi told him that that was the way it had to be. A few weeks went by, but he did not pay any money because he could not afford it. He hid out for a week and saw Riccardi a week or two later on Avenue X. (30 A-31) At one point he was driving on 85th Street in Brooklyn and a car stopped him. Riccardi and Gigliotti had been driving in the car and they got out and had a conversation with him in front of a cemetary. (31) Riccardi asked where he had been and DiPalma replied that he hadn't had a chance to see him. DiPalma said that Riccardi told him if he did not get the money up, he would put him in the hospital where no doctor's bills would be able to pay for it. (32) Gigliotti allegedly said it did not pay for DiPalma to get hurt and that he should pay Riccardi the money he owed him. (32)

DiPalma testified that he came to see Riccardi about two days later and made out a phony check for $900.00 which he gave to Riccardi, in order to reduce

the principle and reduce the interest to $125.00 a week. (42) The record is not clear if he actually gave the check to Riccardi, but in any event the check never was cleared. The witness said he did not know what to do, so he went to the Coney Island police station, spoke to a detective and thereafter went to the District Attorney's office (43-46). The next morning he met with the F.B.I. (47). He also testified that the night of May 17, 1972 the police drove him home and stayed with him. (47-48) Some people pounded on the door that night, but he would not let them in. The people left, and the witness said he looked through the window and recognized Ciro Riccardi (48-49).

About one week later DiPalma was at home and a friend of his came and spoke to his wife. DiPalma went down to the corner and met Riccardi. (49-50) He said that Riccardi punched him a few times in front of his friend. (50) Said event also occurred outside the date alleged in the indictment, since it was about a week after DiPalma went to the police. DiPalma said that he was put against the car by Riccardi. Upon the arrival of Mrs. DiPalma and the stick she was wielding, Riccardi allegedly fled around the corner. (51) DiPalma said he spoke to Arthur Ruffels, described the beating he had received, and the F.B.I. took pictures of him. (52).

DiPalma also described how the agent put a body transmitter on him and drive him to Avenue X where he met with Ronald Gigliotti. DiPalma asked for Riccardi. DiPalma insisted that Riccardi see him. (54) This June 2, 1972, conversation also occurred beyond the dates alleged in the indictment. Motions to exclude the conversations were denied. (55-59) After DePalma insisted on seeing Riccardi, Gigliotti told him to wait there. At any rate, Gigliotti apparently arranged for

DiPalma to meet Riccardi at a furniture store, and after DiPalma went there. Riccardi drove up in a car. (65) Riccardi and DiPalma spoke about the money and DiPalma denied ever being a loan shark or having taken bets from Riccardi or Gigliotti. He also said he paid a total of $7,000.00 interest on a debt of $3,500.00. (68)

The tape was then played for the jury. Cross examination was put off until Ruffels completed his testimony and was cross examined.

Ruffels said that he found out that DiPalma was a bookmaker. A fact that he found out at the Eastern District Strike Force. (33) He also said that the on and off switch on the tape machine was under the control of DiPalma while he was talking, and he told DiPalma before the conversation what type of conversations were necessary to base a prosecution on, such as talking about "vig". (103) Ruffels acknowledged that the tape was not so clear and that he had to prepare three transcripts before the final one was adequate. The witness denied instigating the meeting of June 2, and said that DiPalma told him that they used to meet every Friday at 3:00 P.M., and what Ruffels merely did was suggest he keep the meeting that DiPalma would normally attend. (107) Ruffels could not explain, why there were no meetings on May 19th and May 16th, *i.e.*, their usual practice of meeting on Fridays had apparently been discontinued prior to the June 2nd meeting. (101-111) It was also brought out that Agent Ruffels never made an interview report about the occurrence of May 15th in front of the cemetary, even though Ruffels admitted that he interviewed DiPalma on May 18, 1972, three days after that incident apparently took place. (34) In fact no record of that cemetary incident could be found in any written

report. (35) The agent also admitted that in discussing what type of conversations DiPalma should have with Riccardi, he suggested that a "threat would help". (36) Apparently there was also a conversation which related to the idea of getting Riccardi angry with DiPalma.

The witness said that the time that elapsed from when DiPalma originally met Gigliotti on June 2nd to when DiPalma met Riccardi was about eleven minutes. On redirect Ruffels said that the reason he shut off the tape was so that there would be enough to record the conversation. (134) He said that he really had the controls to shut the tape on or off, although he had previously said he thought the controls were in DiPalma's custody. He saw Riccardi's vehicle approach and that there were no threats made, shouts, weapons or other signs of violence during the conversation. (37) In fact, Riccardi may have been a little apprehensive, since he searched DiPalma. (38)

DiPalma was recalled for cross examination. He said that he was a bookmaker for two years. He discussed the entire operation of his bookmaking business, which basically consisted of taking bets and hedging them at the track. (39 A-43) He described himself as a sometime terrible bookmaker, who really just made bets for people. (46 A-47) He testified that he told Ruffels he was a bookmaker, although Ruffels previously said that he found out that fact at the Eastern District Strike Force and not from DiPalma. (33)

The witness said he had outstanding loans with the First National City Bank in the amount of $5,000.00, Chase Manhattan Bank in the amount of $2,000.00, and all sorts of other obligations. He could not recall what he put down on the application to the First National City Bank as the purpose of the loan and said

he made up many reasons which were not true. (48 A-52) DiPalma admitted that he used the proceeds of all these loans for gambling, even though he knew that a false application for a bank loan was a Federal crime. (53 A-54) DiPalma also admitted that he owed money to Household Finance, Beneficial Finance and he also owed Commercial Credit Corp. between $1,000.00 and $1,400.00. (55 A-58) He also owed Bankers Trust about $2,200.00 to $2,300.00, but he thereafter went into personal bankruptcy so that he did not have to pay anyone back. (59-60)

When he first met Riccardi his friend, Patty McKuehn was with him and McKuehn heard part of the conversation wherein he told Riccardi he needed $1,000.00 for his bookmaking business. (210) DiPalma described what the term "vig" means, although it was established that he told the grand jury he did not know its definition. (61) Dipalma then said that his statement to the grand jury was an honest mistake, since he always knew what the term meant. (62) DiPalma denied ever lending money at usurious rates of interest. (62) He denied that he ever took numbers or bets (63) and was totally confused about debts, remembering practically nothing. (218-228) He said he made his own occasional bets on basketball and baseball but never took any sort of action himself. (64) He also denied that Arthur Ruffels told him what type of conversation to obtain on the tape recording. (65) He said that in fact Ruffels told him not to provoke Riccardi because they feared for his life. (66) He previously had testified that he paid $125.00 a week for three months, a sum totalling $1,500.00, and then when he reiterated that testimony he could not say where he got the $1,500.00 to make the payments. (253-254) He said he did not

know and that he could have obtained it from his father or mother; yet, on something as obscure as who was pitching for the White Sox on a specific occasion where they won four straight games, DiPalma had an incredibly accurate memory. (67-68) He also talked about the $175.00 a week that he paid for two months, totalling $1,400.00, and again could not detail where he got the money from, but he merely said he could have borrowed it from a bank. (255) The witness made a lot of bets, place a lot of numbers himself, but could not or would not identify the people involved. (257-258) He claims he bet thirteen days in a row with the Chicago Cubs but could not identify the person he placed those bets with except by first name. (258) He also denied ever telling the F.B.I. that he took a HANK DAVERSAY to Riccardi to borrow money, (273), although the F.B.I. report said that he had made that statement. (274-275) DiPalma also denied having taken TONY BASILE to see Riccardi, although he had told the grand jury that on one occasion Basile accompanied him to see Riccardi. (275-276, 298) In fact, he said that he never met Riccardi at a time when he was with someone else, so that there was no one who could verify that he actually had all those meetings. (280) The witness became so confused that he even became unsure whether on the third occasion that he borrowed money from Riccardi the meeting occurred in a Lincoln automobile or at the motorcycle shop, or at a luncheonette. (310) The witness's memory became so unclear he could not even remember what he said the day before. (317) In fact, he was not even sure whether he paid $175.00 a week or $50.00 a week in the months preceding his visit to the F.B.I. (321-322)

He said that the bank loans were used to pay the interest to Riccardi, but it was then established that all

but one loan were taken out before he ever met Riccardi. (322-323)

In fact, the witness even attempted to recant some of the information he put in the petition of bankruptcy which he swore to in open court. (64-70)

The witness thereafter attempted to evade practically every question asked for him and indicated his total disregard for the oath he had taken. (71-73, 75-77)

During cross examination by petitioner Gigliotti's attorney, counsel made a big point about whether the witness had been coached during the lunch break as to one question. The intimation was that the Assistant United States Attorney or one of the agents might have suggested an answer. In fact, the witness was specifically asked whether Mr. Ruffels or Mr. Naftalis talked to him before he went out to lunch on the day in question. (78) The witness denied it. The Court called both attorneys to the bench and told the attorney that he had better be careful because he had given the prosecutor permission to have a long lunch hour because he was going to the dentist. The Court told the attorney he was trying to create a false impression in the Jury's mind and that the attorney was not doing a very nice thing by taking the whole matter out of context. In fact, the Court called the entire matter nonsense. (81) The prosecutor made a report to the Court that after he left the Court he went to his office, put his files away and went to the dentist by car. (82) Thereafter, when Mr. Newman pursued the line again in front of the jury, the Court told the jury that defense counsel knew that the prosecutor went to the dentist and he persisted in asking the question trying to create an erroneous impression in the mind of the jury. In fact the Court actually said:

> "THE COURT: The reason why I interrupted Mr. Newman's questioning is, last Thursday before lunch Mr. Naftalis asked the Court for permission to go to the dentist, that's why I adjourned earlier during the Thursday lunch hour, and Mr. Newman knows that Mr. Naftalis went to the dentist during the noon hour and yet he's persisted in asking these questions trying to create an erroneous impression in your mind. Mr. Naftalis has just told me that he did go to the dentist during the noon hour and didn't talk to this witness." (83)

The next witness was JOAN DiPALMA, who described the incident when Riccardi punched DiPalma in the street. (540-541) She said that the "fists were flying". Her husband called her name and she ran down the street with a stick. (541) When she got there DiPalma and his friend, Patty, were standing by the car but Riccardi had already gone around the corner, so that she never saw a punch thrown. (84-85) She never saw Riccardi actually hit her husband. (86)

The government rested its case, and an application by Riccardi to put on three witnesses to testify as to the bad reputation of DiPalma was rejected. (577-578)

The defendant Riccardi then called Arthur Ruffels, the F.B.I. agent, as his own witness. Ruffels testified that he interviewed DiPalma, and on May 22, 1972, DiPalma told him that Tony Basile accompanied DiPalma on one occasion to the luncheonette when he had to pay Riccardi. (583) He also said that DiPalma told him he took Hank Daversa to Riccardi once when DiPalma went to borrow some more money. (584)

HANK DAVERSA, an employee of the Transit Authority, testified on behalf of appellant Riccardi, and said that he sometimes helped DiPalma with his betting slips. (87) He said that DiPalma never took him to see

Riccardi and he in fact never saw Riccardi or Gigliotti in his life. (597)

DOMINICK ZICOLELLO, another Transit Authority employee, testified and said that DiPalma used to take all sorts of bets on horses and sports in general at the Transit Authority. (88-89)

JUSTIN TOMASINO, another Transit Authority employee, said that many people placed bets with DiPalma. (91) He saw DiPalma take numbers from many people, in fact, the witness said he hit a number once for $250.00. (92) He had a hard time getting his money from the number hit and, in fact, had to chase DiPalma and had to go to his house. (94) DiPalma told Tomasino not to pressure him or he would go to the F.B.I. (94) Tomasino was a car maintainer at the Transit Authority and did a lot of extra car work on the cars of fellow employees for which he was paid and concerning which he specifically put the amount on his income tax return. He was a very large gambler and conclusively said that DiPalma had, contrary to his testimony, been involved in policy slips, bookmaking and bet taking at the Transit Authority.

Petitioner Gigliotti called no witnesses and upon counsel's advice did not testify.

ARGUMENTS

I.

COUNSEL AND THE TRIAL COURT HAD A DUTY TO RAISE THE SEVERANCE ISSUE ON BEHALF OF PETITIONER GIGLIOTTI.

A. The Court Erred In Not Ordering a Severence.

Neither defendant Riccardi nor petitioner Gigliotti testified in the trial before the jury. A reading of the record below clearly leaves one with the impression that little, if any, evidence was adduced against Gigliotti. The only witness who could provide evidence in exoneration of Gigliotti was co-defendant Riccardi.[2] Mr. Ricardi would have testified for petitioner had there been separate trials.

In the case of *U.S. v. Koscot Interplanetary, Inc., et al.*, Cr. No. 73-105, Federal Judge Tjoflat (now a judge on the United States Court of Appeals for the Fifth Circuit) ordered a severance for defendant/attorney F. Lee Bailey after six months of trial when it became apparent that alleged co-conspirator defendant Bunting would testify for defendant Bailey if tried separately. Judge Tjoflat properly applied the case of *United States v. Echeles*, 352 F.2d 892 (7th Cir. 1965).

Counsel respectfully submits that on an issue as basic as separate or joint trials, the trial court has a duty to protect the rights of the accused. See *U.S. v. Thomas*

[2]Riccardi is presently at Springfield, Mo. for a 90-day mental observation prior to final sentencing by the trial court.

Carter, 475 F.2d 351 (D.C. Cir. 1972). In *Carter, supra*, defense counsel did not move for a severance; yet, the Court of Appeals found error nonetheless because there was no *sua sponte* court ordered severance.

Counsel respectfully submits that a review of the evidence in the instant case clearly leaves a lingering doubt as to whether there was sufficient evidence that petitioner Gigliotti did anything in violation of the federal laws. Any implication of petitioner came solely through the incriminating evidence introduced against the co-defendant Riccardi. Where only Riccardi knew of any involvement by petitioner and Riccardi would have given exculpatory evidence of petitioner but for joinder of the two defendants there must be a reversal and remand for a new trial. *Echeles, supra.*

No doubt the Government shall argue severance cannot be now raised since *Echeles, supra*, was not the subject of a pre-trial motion. Such is and should not be the law.[3]

B. Ineffective Assistance of Counsel re Severance.

In the event that the Court fails to apply the *sua sponte* court duty to cause a severance, counsel

[3]Mr. Riccardi is presently at Springfield, Mo. under psychiatric observation prior to his sentencing. Hence, it is physically impossible for counsel to procure a necessary affidavit from Mr. Riccardi *re* his exculpatory testimony for petitioner. Counsel submits most respectfully that the Court should at the very least remand this case to the trial court for purposes of a hearing upon the return of Mr. Riccardi, whereby the record can be made on the *Echeles* matter.

respectfully submits that failure of trial counsel for petitioner to properly brief said point pre-trial constituted ineffective assistance of counsel.

Since motions requesting relief on grounds of ineffective assistance of counsel raise "questions of extreme difficulty in the administration of justice"[4] and often tax otherwise harmonious relationships between brother members of the Bar, it is appropriate that we begin this memorandum with a brief explanatory note. Trial counsel for Defendant was an experienced and distinguished member of the Bar of the State of New York. For this reason as well as a professional sensitivity to the obligation that an attorney not raise frivolous claims and a personal sensitivity to intellectual honesty, Counsel considered the merits of this motion long and hard. Because we believe it has merit and because "[e]ven the best attorney may render ineffective assistance, often for reasons totally extraneous to his or her ability,"[5] we press this request upon petitioner's behalf with vigor. In so doing, however, we are conscious that "the issue in effectiveness cases is not a lawyer's culpability, but rather his client's constitutional rights."[6] It is in this spirit that our request on petitioner's behalf is made.

1. *The Standard of Review: United States v. Decoster.* On October 4, 1973, the Court of Appeals for the District of Columbia Circuit set forth in detail a restatement of the law surrounding claims of counsel's

[4]*Jones v. Huff*, 80 U.S. App. D.C. 254,152 F.2d 14 (1945).

[5]*United States v. DeCoster*, 159 U.S. App. D.C. 326, at 331 n. 21, 487 F.2d 1197, at 1202 n. 21.

[6]*Id.*

trial effectiveness. It states that the "court does not sit to second guess strategic and tactical choices made by trial counsel" but added that, "when counsel's choices are uninformed because of inadequate preparation, a defendant is denied the effective assistance of counsel."[7] And this right to effective assistance of counsel was characterized by the Court as "a defendant's most fundamental right" since it affects his ability to assert any other right he may have.[8] Explaining its holding, the Court states (and emphasized by italics) the following standard: "a defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate."[9]

The Court then listed a number of duties, all of which are owed in fulfillment of this obligation. Several are relevant to petitioner's present claim. First, the Court states broadly the following:

> *In General* Counsel should be guided by the American Bar Association Standards for the Defense Function. They represent the legal profession's own articulation of guidelines for the defense of criminal cases. 487 F.2d at 1203 (footnotes omitted).[10]

Section IV of the American Bar Association Standards for the Defense Function deal with investigation and preparation by trial counsel. Section 4.1 is entitled "Duty to investigate" and imposes the following obligation on trial counsel:

[7] *United States v. DeCoster, supra*, 159 U.S. App. D.C. at 330.

[8] *Id.*

[9] *Id.*

[10] *Id.* at 331

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or his stated desire to plead guilty.[11]

In the commentary that follows the enunciation of this duty, the Standards note the critical importance of full investigation of *all* avenues of inquiry relevant to guilt or innocence or otherwise bearing on culpability. The Standards make specific reference to an attorney's obligation to develop information concerning the "defendant's . . . mental and emotional stability."[12] They state: "Investigation is essential to fulfillment of these functions. Such information may lead the prosecutor to defer or abandon prosecution and will be relevant at trial and at sentencing."[13]

DeCoster emphasizes the importance of this investigatory obligation by setting it forth as one of the specific duties "owed by counsel to a client":

> (3) Counsel must conduct appropriate investigations, both factual and *legal*, to determine what matters of defense can be developed. The Supreme Court has noted that the adversary system requires that "*all available defenses are raised*" so that the government is put to its proof. This means that in most cases a defense attorney, or his agent, should interview not only his own witnesses but also

[11] ABA Standards for the Defense Function (App. Draft, 1971) at 161.

[12] *Id.* at 227.

[13] *Id.*

> those that the government intends to call, when they are accessible. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. And, or course, the duty to investigate also requires adequate legal research. (footnotes omitted.) (Emphasis added).[14]

DeCoster enforces the rigor of this requirement by the holding that "[i]f a defendant shows a substantial violation of *any* of these requirements he has been denied effective representation unless the government, 'on which is cast the burden of proof once a violation of these percepts is shown, can establish lack of prejudice thereby.' *Coles v. Peyton,* 389 F.2d 224, 226 (4th Cir., 1968)." (Emphasis supplied.)[15] Because the record in *DeCoster* did not adequately reflect the extent to which counsel had failed to interview witnesses or otherwise investigate possible defenses and perform other required services on DeCoster's behalf, the Court remanded the case for the limited purpose of a hearing at the trial-court level.

2. *Trial Counsel's Fulfillment of the DeCoster Duties.* Whatever the extent of trial counsel's pretrial investigation of the substantive evidence surrounding petitioner's involvement in the crime, he omitted to investigate fully what the co-defendant had to offer his client in the way of a defense and further failed to fully articulate an *Echeles* motion.

3. *Relief Requested.* We are prepared at a hearing to present testimonial and documentary evidence in

[14]*United States v. DeCoster, supra,* 159 U.S. App. D.C. at 333.

[15]*Id.*

support of the foregoing argument. Unless the Government can demonstrate that trial counsel's omissions as described above did no harm to petitioner, he is entitled to a new trial. Both in *DeCoster* and in a recent case rearticulating its principles, *United States v. Butler,*[16] The Court of Appeals has placed the burden of proving no prejudice squarely at the feet of the Government. *Butler* states that burden as follows:

> On reviewing the facts of this case, we believe that appellant has demonstrated a substantial violation of the duties owed him by his counsel. Partly because the very ineffectiveness of the assistance may lead to prejudice not being reflected in the record, *the burden at this point shifts to the Government to establish a lack of prejudice.* (Emphasis supplied.)[17]

We do not believe that the government can establish such an absence of prejudice. The defense had to have been substantial with the co-defendant prepared to show at a minimum that petitioner was nothing more than an innocent bystander in this affray which resulted in petitioner being sentenced up to eight years imprisonment.

We are prepared to support petitioner's move for a new trial on grounds of the absence of effective assistance of counsel by whatever evidentiary showing, if any, this Court deems desirable.

In the event the Court determines that trial counsel exercised due diligence in attempting to ferret out evidence of petitioner's innocence and simply was unable to learn the information that we have provided by this motion, we ask on petitioner's behalf that he be

[16]D.C. Cir. No. 73-1891, decided August 30, 1974.

[17]*Id.*, slip op. at 9.

granted alternatively a new trial based on newly discovered evidence also under Rule 33 of the Federal Rules of Criminal Procedure.[18]

II.

THE GOVERNMENT'S GRAND JURY PRESENTATION OF ITS CASE AGAINST RONALD GIGLIOTTI WAS WHOLLY INADEQUATE; THE FAILURE TO SUBMIT ANY EVIDENCE OF CRIMINALITY ON THE PART OF PETITIONER SHOULD HAVE RESULTED IN A RULING BY THE DISTRICT COURT THAT IT WAS WITHOUT JURISDICTION TO PROCEED WITH THE TRIAL.

Ronald Gigliotti was sentenced to a prison term of eight years on a charge that he participated in the extortion of Frank DiPalma. By the jury's verdict this charge was proved, after trial, beyond a reasonable doubt. Petitioner Gigliotti now challenges the sufficiency of the evidence against him. Petitioner respectfully asks that his conviction be set aside in that under the Grand Jury clause of the Fifth Amendment, he should never have been "held to answer" these charges.

This is not a case where a defendant seeks review of the legality of the evidence presented to the Grand Jury. *United States v. Calandra*, 414 U.S. 338, 94 S. Ct.

[18]A further part of the degree of petitioner's continued failure to be properly guarded in this case is the fact that appellant counsel for co-defendant Riccardi agreed to file a Petition for *Writ of Certiorari* and neglected to do so in a timely manner. Hence, the filing of this petition at this time by new counsel.

613 (1974) Nor is this a case where the character or competence of the Grand Jury testimony is submitted for question. *Costello v. United States*, 350 U.S. 359, 76 S. Ct. 406 (1956); *Lawn v. United States*, 355 U.S. 339, 78 S. Ct. 311 (1958) Rather, this is a case, hopefully rare, where the Strike Force attorneys' submission of evidence to the Grand Jury was so shoddy that it denied petitioner his Constitutional and Statutory right to have the evidence against him considered by a Grand Jury acting independently of the prosecutor. Assuming *arguendo*, however, that this presentation met Constitutional requirements, petitioner respectfully asks that this Court reverse his conviction and dismiss the Indictment under its supervisory power. *United States v. Estepa*, 471 F.2d, 1132, (2nd Cir., 1972); *United States v. Toscanino*, 500 F.2d 267 (2nd Cir., 1974); *McNabb v. United States*, 318 U.S. 332, 63 S. Ct. 608 (1943).

Counsel need not debate too long whether the Grand Jury properly functions as an independent shield between the citizen and the prosecutor. See, e.g.: *The Grand Jury: True Tribunal Of The People Or Administrative Agency Of The Prosecutor*. 2 N.M.L. Rev. 141 (1972)[19] Focusing on the instant case, it will become clear that the manner in which the "evidence" against Gigliotti was presented lends firm support to the "rubber stamp" theory. This is not simply another case where a convicted defendant asks the Supreme Court to test the sufficiency or quality of the evidence before the Grand Jury. The cases which foreclose this type of

[19]A case recently decided by the California Supreme Court discusses whether Grand Jurors serve only as rubber stamps of the prosecutor. *Johnson v. Superior Court*; Calif. Sup. Ct., 9/19/75, 18 Cr. L. 2054 (October 15th, 1975)

review are legion. *Costello v. United States*, supra; *Lawn v. United States, supra; United States v. Schwartz*, 464 F.2d 499 (2nd Cir., 1972). By implication, however, these cases presuppose a basic respect for the Grand Jury as a body acting independently, albeit under the direction of the prosecutor. When this basic respect is absent, such as where the Grand Jury is mislead, Courts will not hesitate to act. *United States v. Estepa, supra; United States v. Gallo*, 394 F.Supp. 310 (D. Conn., 1975) ("Accordingly, courts must be ever viligant to preserve the functions of the Grand Jury as an effective 'safeguard against oppressive actions of the prosecutor . . .' ") *Gaiter v. United States*, 413 F.2d 1061, 1066 (D.C. Cir., 1969) 394 F.Supp. at 313; *United States v. Cox*, 342 F.2d 167, 170 (5th Cir., 1965). See also *Daneals*, 370 F.Supp. 1289 (W.D.N.Y., 1974).

Appellant was obviously tried and convicted in this case as an aider and abettor. The record is clear that Gigliotti's alleged participation in this extortionate credit transaction surfaced in two meetings with DiPalma. The first such instance was at a cemetery on May 15th, 1972, and the second was under the scrutiny of Federal Agents on June 2nd, 1972.

The only evidence concerning petitioner before the Grand Jury came through the testimony of Frank DiPalma. DiPalma appeared before a Federal Grand Jury on three occasions, May 22nd and June 13th, 1972, and April 18th, 1973.[20]

DiPalma's first appearance before the Grand Jury took place on May 22nd, 1972 which was some ten

[20]Each of the transcripts of DiPalma's Grand Jury testimony is contained in its entirety in Appellant's Appendix in the record below. (A8-43)

days *before* the June 2nd meeting at which the conversations were recorded. At this first appearance DiPalma essentially read and swore to a statement he had previously furnished to F.B.I. Agent Ruffels. (10-11) In that statement DiPalma recounted the history of his alleged "extortionate credit transaction with Riccardi, then known to him only as "Zero". (11) With respect to individuals other than Riccardi, the statement referred to a meeting in November or December of 1971 where DiPalma complained that he could not keep current with the interest payments. (12) Two unidentified individuals were present at this meeting. In addition to describing their physical features DiPalma characterized both individuals as "Jewish looking" (12-13)

The statement then went on to describe the meeting of May 15th, 1971, which took place in Brooklyn near a cemetery. (14) Here another unidentified individual was present with Riccardi. Once again the unidentified individual was described as "Jewish looking". (14) It was clear, however, that this individual, because of substantially different age and description was not one of the two previously mentioned unidentified individuals. (A 14) Significantly, this statement furnished some three days after the meeting made no mention of any statement made by Riccardi's unidentified companion.[21]

[21]This fact, of course, armed trial counsel with a key discrepancy on which to cross-examine. This fact is now raised to show that the Grand Jury had no evidence of any alleged criminal participation on May 15th by Gigliotti.

On June 13th, 1972, DiPalma returned to the Grand Jury.[22] As seen, there was no evidence whatsoever presented against Gigliotti on the first appearance, May 22nd. Certainly the prosecutor cannot be faulted for not presenting what he didn't have. The June 2nd meeting had not yet occurred. There was no tape. And curiously, Riccardi's "Jewish looking" companion on May 15th said nothing.[23] On June 13th, however, the same prosecutor was better equipped. He then had the taped conversation which obviously lead to Gigliotti's conviction. This tape, however, was neither played for, nor was it considered by the Grand Jury. Simply stated, they acted without it. Petitioner does not now suggest that the Government was under an obligation to present all of its evidence to the Grand Jury. Nor does he suggest that the prosecutor must furnish his best evidence to the Grand Jury. It would seem, however, that the Government attorney is under an obligation to present some evidence to the Grand Jury on which they could find that there is probable cause that a particular individual had committed or participated in a particular crime.

This Court has held that an Indictment establishes probable cause and thus eliminated the need for a preliminary examination. *Sciortino v. Zampano*, 385

[22]In his first Grand Jury appearance, in reading his statement, DiPalma referred to the "cemetery" meeting as having occurred on May 15th, 1971. (14) On his second appearance this error was corrected and the meeting was placed on May 15th, 1972. (30)

[23]This is regarded as curious because at trial some three years after the meeting DiPalma testified to a somewhat telling statement by petitioner.

F.2d 132 (2nd Cir., 1967). The *Sciortino* decision necessarily assumes that the Grand Jury is furnished with some evidence which could arguably support a finding of probable cause. With this in mind, we look to DiPalma's testimony before the Grand Jury on June 13th, 1972. At this time DiPalma again recounts the history of his relationship with Riccardi. He again testified to the manner in which the loan was made and then partially re-paid. Again, reference was drawn to a meeting in November or December of 1971 when he met Riccardi with two unidentified individuals. (24-30) During this testimony the unidentified individuals were described as his partners in the "shylocking business." (A 30) By his testimony neither of these two individuals were present with Riccardi on May 15th. In fact, on this appearance DiPalma drew reference to another unidentified individual to whom he allegedly repaid part of the Riccardi loan. (28, 29) With reference to the May 15th meeting DiPalma again recalled that a friend of Riccardi's was present. (29-30) There was again no mention of any words uttered by that friend. (29-30)

Later in his testimony DiPalma, for the first time under oath, recounted the events of June 2nd when he wore the transmitting device. DiPalma recalled that he first met an individual whom he identified at trial as Gigliotti. It is significant to note that Gigliotti was not identified in the Grand Jury. In fact, DiPalma's Grand Jury testimony on June 13th was that this person, later identified as Gigliotti, was previously unmentioned. In other words, at the trial DiPalma swore that Gigliotti was the same individual who was with Riccardi on May 15th. In the Grand Jury his testimony was substantially different. On June 13th he testified as follows:

"Q. Have you talked about that guy at all today? Is he one of the unknown persons you referred to in your answers, either the guy who used to get the money at the luncheonette or either of the two men inside the cycle shop?

A. No, he's not.

Q. This is a new person?

A. A new person." (34)

Again, this serious inconsistancy between the Grand Jury and trial testimony is not pointed out to have this Court weigh the credibility of the witness; for purposes of this petition it demonstrates that there was no testimony before the Grand Jury about Gigliotti other than the testimony regarding June 2nd, 1972. At trail the petit jury considered two meetings at which Gigliotti was allegedly present. The Grand Jury obviously only considered the June 2nd meeting. The entire testimony concerning Gigliotti's alleged participation came as follows:

At page 17 of the transcript of DiPalma's Grand Jury appearance on June 13th, 1972 (34), the witness for the first time refers to the individual whom he identified at trial as petitioner Gigliotti. Attempting to find Riccardi, DiPalma "made arrangements" with Gigliotti and finally met him in the company of petitioner. According to the witness, Riccardi's "friend" Gigliotti repeatedly told Riccardi that "Look, he has a family as well as you have and he has to make good." (A36) This, of course, cannot be construed in any manner as an extortionate threat within the meaning of Section 891(7). The only other occurrance wirthy of note was DiPalma's recollection that Riccardi told him that his friend had a gun and then instructed his "friend" to

shoot him if he moved. (36-37) There was, however, no evidence that the "friend" either had a gun or joined in this threat. The totality then of the Grand Jury evidence against this fifth unidentified individual[24] was the statement not to the alleged victim but to Riccardi that "Look, he has a faimly as well as you have and he has to make good".

On DiPalma's third appearance before the Grand Jury, nearly one year later on April 18th, 1973, the witness merely re-affirmed his earlier testimony furnished on May 22nd and June 13th, 1972. (41)

From a review of the Grand Jury proceeding two problems emerge. First there was absolutely no evidence of criminality on the part of Ronald Gigliotti. Secondly, Gigliotti was not identified before the Grand Jury. There may be cases where the failure to identify a prospective defendant before the Grand Jury may not constitute a Constitutional violation. *Unites States Ex Rel Curtis v. Warden of Greenhaven Prison*, 463 F.2d 84 (2nd Cir., 1972). In deciding the *Curtis* case this Court relied upon its earlier decision in *United States Ex Rel Morrison v. Forster*, 175 F.2d 495 (2nd Cir., 1949). The *Curtis* Court ruled that

> "In the light of *Morrison*, the contention that it violated due process merely to fail to provide the

[24]The witness DiPalma had previously referred to two unidentified individuals at the cycle shop, allegedly Riccardi's partners in the shylock business and an unidentified individual to whom he allegedly made payments at the luncheonette. At the time of his Grand Jury testimony the individual who accompanied Riccardi on May 15th, 1972 was not the same person he met on June 2nd, 1972. On the basis of this testimony Gigliotti is the fifth unidentified individual referred to in the Grand Jury.

> grand jury with a description of petitioner, where the jury must have realized it was indicting a specific individual, known to the testifying officers (albeit by the false name Henry) for a specific narcotics transaction, must fail." 463 F.2d at p. 87

In the instant case the Grand Jury heard testimony about arguably four and possibly five unidentified persons who may have been considered accomplices of defendant Riccardi. Quite significantly, the Indictment in this case charged that Gigliotti's participation came between May 1st, 1971 and May 18th, 1972. There is no argument here that petitioner did not receive fair notice of the charges against him. However, it should be remembered that the Grand Jury heard absolutely nothing about Gigliotti, even as an unidentified person, during that time period. The only evidence of his involvement referred to June 2nd, 1972. During the time period pleaded in the Indictment other unidentified individuals were mentioned. The root question, therefore, is that on the evidence before the Grand Jury, how was a true bill returned against Ronald Gigliotti? Stated another way, how can it be determined from the Grand Jury proceeding that they intended to indict Ronald Gigliotti? If the procedure in this case is sustained, it would allow the prosecuting attorney while physically preparing the Indictment, to insert the name of any individual whom he considered as a candidate to fit the slot of one of the unidentified individuals referred to in the Grand Jury.

Petitioner's argument, therefore, becomes two dimensional. His first allegation is that without regard to the identification problem, there was no evidence presented to the prosecutor on which an Indictment could be based. The tape recording was not played for

the jurors, nor was the transcript shown to them. There was absolutely no evidence that Gigliotti had a stake in this alleged criminal venture. To indict Giglioti, therefore, was obviously a unilateral determination made by the prosecutor upon a review of evidence which the Grand Jury had never heard or seen. Obviously presentations to the Grand Jury must be the product of a prosecutor's discretion as the exercise of that discretion conforms to his oath of office. However, to obtain an Indictment without a proper presentation to the Grand Jury renders the Grand Jury process meaningless and supports the so-called "rubber stamp" theory. Clearly, petitioner's argument is not a philosophical one that all Grand Jury action is merely a stamp of approval on the prosecutor's choice of defendant. Here the argument is a pragmatic one. The Grand Jury returned an Indictment without any evidence that one of the two persons indicted had violated the statute in question. This problem is then compounded by the fact that there is no basis to determine whether the Grand Jury knew who they were indicting.

The latter problem would be easier of solution if the prosecutor's remarks and instructions to the Grand Jury were now available for review. The only basis on which to now assess this matter is the prosecutor's representations during the trial and at the time of sentence.

The issues raised herein were raised by trial counsel in the District Court immediately after he received the Grand Jury testimony. By virtue of the secrecy requirements of the Grand Jury and relevant statute, Title 18, U.S.C., Section 3500, counsel's first opportunity to view this testimony came during the trial. Prior to the conclusion of DiPalma's direct testimony the following record was made:

Defense counsel:

> Then I would ask your Honor to do something else, if you will. I would ask Your Honor to look at the Grand Jury testimony that's been adduced here for this reason, Judge: maybe this is premature, but if you would look at the grand jury testimony, which I assume is the grand jury we've been furnised as 3500 material, of Mr. DiPalma, I would respectfully ask Your Honor to dismiss as far as Mr. Gigliotti is concerned on the grounds, Judge, that no evidence was adduced in the grand jury against Mr. Gigliotti; none.
>
> I submit to Your Honor Mr. Gigliotti has a Sixth Amendment right [sic] right to be indicted by a grand jury which has evidence against him.

The Court:

> This kind of motion you make at the end of the plaintiff's case, not during the course of the trial." (89)

At the end of the Government's case counsel again moved for dismissal of the Indictment on the basis of an inadequate Grand Jury presentation. (370) Counsel then stated that

> "[Gigliotti] is not identified but assume for a moment he is, there was nothing said in the way of a criminal nature.
>
> He never, obviously, waived Indictment and there is no other evidence in this record – when I say this record, I'm sorry – grand jury record, either indicting him, indicating he is involved in any criminal activity and I think he was deprived of his Constitutional rights." (371)

Continuing with the trial record, the Court sought to determine how Gigliotti was indicted.

"The Court:

> Mr. Newman appreciates all that and so do I. But, what he said was – and it is puzzling to me – is how the grand jury came up with the name of Gigliotti.

The prosecutor:

> The Government supplied them with that name.
>
> The Government drafts the Indictment. That is known to the defense and the Court.

The Court:

> I understand that but based upon no identification, no nothing – I mean, did Mr. Ruffels take the stand before the grand jury and say 'this third man' –

The prosecutor:

> I don't believe he did –

The Court:

> (continuing) this second man is Gigliotti"? That's what Mr. New is asking and I think it is possibly a bona fide question.
>
> What he is saying, if all you have got is what you have here and Mr. Murphy went in and said 'The other guy involved is Gigliotti. Return an Indictment against him,' he says that is improper and I am not sure it is not improper. That would bother me.
>
> If the F.B.I. went in and testified that the third man or his identity is based on the investigation that was done on Mr. Gigliotti, I don't think I'd have a problem with it." (375-376)

Later, with regard to Gigliotti, the Court stated that

> "The other man wasn't identified. Nobody was identified. That's not even tied into the original guy as far as the grand jury is concerned. That could be three separate people. Mr. Newman says that might be you, me and him for all we know." (382)

At the end of the Government's case the Trial Court reserved decision on the defendant's Motion to dismiss. (382) At the time of sentence, after memoranda had been submitted by both sides the Motion was denied and the judgment of conviction was entered. In denying this Motion the Court relied upon representations by the prosecuting attorney contained in a post-trial Memorandum submitted in opposition to Gigliotti's Motion to dismiss. In this Memorandum[25] the Government contends, as undoubtedly they will in response hereto, that "evidence was offered to this Grand Jury concerning the criminal involvement of defendant Ronald Gigliotti". (395) Reference is then made to the testimony of May 22nd, 1972 at page 7 of the transcript. Indeed, DiPalma at time of trial, testified to some participation by Gigliotti on this date. However, as far as the Grand Jury knew there was no reason to believe that the second individual on this date was Gigliotti and moreover, Riccardi's companion was not alleged to have made any statement.

The Memorandum then refers to DiPalma's testimony before the Grand Jury on June 13th, 1972. Here, as indicated above, there is no evidence of criminality on the part of Gigliotti. The Government nevertheless relies upon the fact that

[25]The Memorandum is contained in Appellant's Appendix at page 394 in the record below.

> "Fuller testimony from the witness DiPalma plus photographs and a sound recording of this meeting were offered by the Government during the course of the trial itself." (395)

If, however, the defendant was denied his Constitutional right to be charged by a Grand Jury, the evidence at trial cannot salvage that Constitutional violation. Petitioner submits that the Fifth Amendment Indictment requirement is jurisdictional. In *Ex Parte Bain* 121 U.S. 1, 7 S.Ct. 781 (1887) the Court stated that:

> "We are of the opinion that an indictment found by a grand jury was indispensible to the power of the court to try the petitioner for the crime with which he was charged." 7 S.Ct. at page 787.

It is clear, therefore, that the Government may not relv upon either the verdict or its proof at trial to salvage an otherwise Constitutionally infirm beginning to the prosecution.[26]

More significantly the Government's post-trial Memorandum injected new facts:

> "At the time of the submission of that indictment counsel for the Government identified

[26]There is language in *United States Ex Rel Curtis v. Warden of Greenhaven Prison*, supra, that a jury's finding of guilt beyond a reasonable doubt may cure a defective Indictment. This case, as well as the *Morrison* case, are both habaes corpus applications which arise from a New York State criminal prosecution. The "Grand Jury clause" of the Fifth Amendment is not applicable to the States. *Hurtado v. California*, 110 U.S. 516, 4 S. Ct. 111 (1884) On a Federal Constitutional basis the Fifth Amendment is clear that "no person shall be *held to answer* . . . unless on a presentment or indictment of a Grand Jury. . ." (Emphasis supplied) From a plain reading of the Amendment's language it would seem that the matter is jurisdictional.

defendant Gigliotti as the perpetrator of the acts noted in the Grand Jury testimony above. Counsel asked the Grand Jury if it needed any additional identification of either defendant and the Grand Jury indicated that it needed no further identification of either defendant. Counsel for the Government indicated in his statement to the Grand Jury that the F.B.I. had identified defendant Ronald Gigliotti as the person described by DiPalma in his Grand Jury testimony. Based on this representation by counsel for the Government and the direct testimony of the victim of the extortion crimes the Grand Jury indicted the above named defendant. United States submits that there was sufficient non-hearsay evidence before the Grand Jury to uphold this indictment. Further the United States submits that the hearsay statement of Government counsel before the Grand Jury as to the identity of Ronald Gigliotti was labeled as hearsay and understood to be so by members of the Grand Jury at the time the indictment was voted upon." (395-396)

These statements which are represented to have been made by Government counsel were not recorded. (421)

Nearly three years ago, this Court in *United States v. Peden*, 472 F.2d 583 (3nd Cir., 1973) stated that it would be the "better procedure" to have the prosecutor's statements to the Grand Jury recorded. The Court stated, however, that absent unusual circumstances the mere failure to record will not require reversal. This case, however, is markedly different. Here the crucial question was how did Gigliotti get indicted on the basis of the testimony before the Grand Jury? The record of the Grand Jury proceeding does not supply the basis on which the Indictment was voted. With all due deference, the very

purpose of the Grand Jury system is to avoid complete reliance on the prosecutor. Where, as here, that reliance is so critical, it would not seem proper to rest on remarks that were not recorded and which cannot now be objectively reviewed.

It is clear then that this not simply an issue of inadequate identification. Although petitioner submits that on the facts of this case the identification was inadequate, the more serious issue is the complete lack of any evidence of criminality on Gigliotti's part. Taken together it becomes certain that the Grand Jury did not in this case serve as a buffer between the prosecutor and the citizen. *Stirone v. United States*, 361 U.S. 212 80 S.Ct. 270 (1960); *Russell v. United States*, 361 U.S. 749, 82 S.Ct. 1038 (1962); *Orfield, The Federal Grand Jury*, 22 F.R.D. 343, 394 (1959). Recently, in *Gerstein v. Pugh* U.S. 95 S.Ct. 854 (1975), the Supreme Court reiterated the principle that prosecutorial judgment without independent review cannot pass Constitutional muster. Reduced to its simplest terms, this was a case where a defendant was brought to trial solely on the basis of prosecutorial judgment. The Grand Jury heard no evidence of a crime committed by Gigliotti. Further, identification of Gigliotti as a participant in the crime came through the representations of the prosecutor himself. This was not the same as putting an investigator on the stand to give hearsay testimony. This was a case where obviously the prosecutor collected all the relevant facts and obtained an Indictment on the basis of what he knew, was presented to the Grand Jury. Here then the Grand Jury did not serve as an independent investigative body reviewing the evidence submitted by the prosecution. Here, with rare insight, we realize that the Grand Jury

merely parroted the judgment of the prosecutor. This type of procedure, it is submitted, is Constitutionally intolerable.

III.

THE DELIBERATE ELECITATION BY THE PROSECUTOR FROM THE F.B.I. AGENT THAT THE AGENT WAS SPECIALLY ASSIGNED TO THE ORGANIZED CRIME DIVISION CONSTUTED CLEAR ERROR AND REQUIRES A REVERSAL OF THE INSTANT CONVICTION.

Arthur Ruffels is an F.B.I. agent who testified at trial that he was the agent assigned the Riccardi/Dipalma investigation. (22). The prosecutor apparently dissatisfied with the fair answer *supra* then specifically asked where Agent Ruffels was assigned. Over objection and before the jury Ruffels testified that, "I am assigned to the *organized crime* division." (22, emphasis added). That fact coupled to the charges of extortion and "shylocking" plus the clear Italian heritage and names of both defendants being tried in New York City, *i.e.*, the central forum of alleged Italian linked "mafia" or organized crime, caused a most speedy unraveling of due process as pertains to petitioner.

Both defense attorneys leaped to their feet and objected, approached the bench and asked for mistrials while the case was in its earliest testimonial stages. The court simply instructed the jury that the unit to which Agent Ruffels was detailed was not material. (25-26) Justice Jackson best articulated the effect of such an instruction in *Krulewitch v. United States*, 336 U.S. 453 (1949), when he wrote:

> "the naive assumption that prejudicial effects can be overcome by an instruction to the jury . . . all practicing lawyers know to be unmitigated fiction."

There is a repository of case law governing proper prosecutorial conduct in a case. The Court set the guidelines in *Berger v. U.S.*, 295 U.S. 78,88 (1934), when it authorized fair but not foul prosecutorial blows. Counsel is aware that prosecutors are entitled to be advocates and earnestly try and persuade the jury of the truth of his side, *DiCarlo v. U.S.*, 6 F.2d 364, 368 (2d Cir.), *cert. denied*, 268 U.S. 706 (1925); however, prosecutors cannot exceed permissible bounds. Evidence cannot be introduced in order to deliberately mislead the jury. *Berger v. U.S.*, *supra*.

In *Brown v. U.S.*, 125 U.S. App. D.C. 220, 370 F.2d 242 (1966), the court criticized a warning by a prosecutor that if the defendant were acquited, the police would be left powerless to protect against attacks upon them short of resort to "martial law." In *Vierack v. U.S.*, 318 U.S. 236 (1943), the court was critical of the prosecutor's comments which included, "This is war. It is a fight to the death. The American people are relying upon you . . . for their protection." 318 U.S. at 247 N.3. Recent cases in the Court of Appeals for the District of Columbia Circuit have been reversed where the federal prosecutor made analogies to Shirhan Shirhan, Jack Ruby, James Earl Ray and others in an effort to outrage the jury at the very end of the trial. *U.S. v. Jones*, 157 U.S. App. D.C. 158, 482 F.2d 747 (1973). The instant case differs only because the jury was lead to a state of bias and inflamation at the beginning of the trial.[27]

[27]There are examples of misused descriptions which may assist the Court here. For example, in situations where prison authorities have sought to classify inmates as members of organized crime or "special case" prisoners, the Courts have been

Where prosecutors cannot use analogies such as refer to Shirhan Shirhan, James Earl Ray, and Jack Ruby, then they must not be permitted to deliberately inject

striking down such a characterization. Thus, in *Masiello v. Norton*, 364 F.Supp. 1131 (D.Conn.1973), the labeling of someone as a member of "organized crime" was struck down and prison authorities were ordered to remove such classification. Thereafter, in *Catalano v. United States*, 383 F.Supp. 346 (D.Conn.1974) the alternate method adopted by prison authorities to get around the *Masiello* decision by labeling a prisoner a "special offender" was also struck down. It was recognized that classifying a person in such a special capacity violated due process, and that persons so characterized were entitled to hearings. In other words, if an authority is to brand someone as belonging to organized crime, they would have, so to speak, to prove it or refrain from the characterization. The Court in *Masiello* said that elemental fairness required that a person be given the opportunity to rebut the organized crime label. Apparently it has been felt that the onus attached to such a label is so great that a person may never, ever remove the stigma.

More recently, the rationale of these decisions has been adopted by an as yet unreported case decided in this Court, *Cardaropoli, et al v. Norton*, __F.2d__ (2nd Cir. September 29, 1975). In that case this Court affirmed the ruling of Judge Zampano of the United States District Court for the District of Connecticut, which required the Correctional Institute at Danbury to expunge the "special case" classification from all bureau prison files and enjoined reclassification until the subject prisoners were given hearings in a Court with certain basic concepts of due process. Certain remarks made in *Cardaropoli, supra*, refer to "...the grave consequences of this designation..." (*supra* at Page 79 of slip opinion), and the reference to Judge Zampano's statement that 'all the consequences of a "special offender" classification are significant' (*supra*, at Page 81 of slip opinion), indicate that calling a person a member of organized crime is probably just as detrimental as an improper reference to race, religion or creed.

It has generally been recognized that prisoners lack certain fundamental rights attendant to other citizens and that they are not entitled to protection in the same manner as other persons who have not been convicted of crimes. It seems clear that if this

organized crime into a case involving two Italian defendants on trial for "shylocking" in New York City and then introduce evidence from tape recordings which

classification is regarded as so serious for persons who are not entitled to the granting of protection, it should be even more important with respect to those who are on trial, not yet convicted, and are certainly entitled to greater protection under our concepts of due process and equal protection. There is no question that if in this case a single improper reference was made to the race, religion or background of the defendants that it would constitute reversible error. *Griffin v. Illinois*, 351 U.S. 12, reh. den. 351 U.S. 958 (1956); *United States ex rel. Haynes v. McKendrick*, 350 F.Supp. 990, aff. 481 F.2d 152 (2nd Cir. 1973). Surely the deliberate reference to petitioner as being a part of an organized crime investigation should stand in the same category. The statement by the agent, directly solicited by the prosecutor, that he was a member of the organized crime division created the implication that petitioner Gigliotti was a member of organized crime. The Government simply cannot justify such a deliberate action by its prosecutor in this case.

Not only is the reference to organized crime improper because it categorizes a person in a special way, but it also seems that a fair inference that the jury would draw is that the *defendant*, being a member of organized crime, is a man with criminal tendencies in general or a man who has on other occasions committed other criminal acts. It is basic that the Assistant United States Attorney could not have brought out other crimes except for certain exceptions, *Hodge v. United States*, 126 F.2d 849 (D.C. Cir. 1942); *United States v. Tomaiolo*, 249 F.2d 683 (2nd Cir. 1958); *United States v. Harrington*, 490 F.2d 487 (2nd Cir. 1973); *United States v. Yaughn*, 493 F.2d 441 (5th Cir. 1974). Nor would he be able to prove a defendant's criminal tendencies as a general proposition. *United States v. Nakaladski*, 481 F.2d 289, *cert. denied*, sub. nom. *Coco v. United States*, 414 U.S. 1064 (5th Cir. 1973); *United States v. McCarthy*, 470 F.2d 222 (6th Cir. 1972); *United States v. Brettholz*, 485 F.2d 483, cert. den. sub. nom. *Santiago v. United States*, 94 S.Ct. 1561 (2nd Cir. 1973); *United States v. Hines*, 470 F.2d 225, cert. den. 410 D.S. 968 (3rd Cir. 1972); *United States v. Broadway*, 477 F.2d 991 (5th Cir. 1973).

The error existed in this case at the very outset of the trial and since the case was not particularly complicated and little

implied organized crime when coupled to the malignant effect of the organized crime reference.

IV.

THE EVIDENCE CONSIDERED IN THE LIGHT MOST FAVORABLE TO THE GOVERNMENT IS INSUFFICIENT TO SUSTAIN PETITIONER'S CONVICTION.

Petitioner respectfully requests that the evidence against him, considered in the light most favorable to the Government,[28] was insufficient to sustain his conviction on count Two. What Gigliotti did, whether per the Government evidence or otherwise, simply does not rise to the level of a violation of Federal Statute. Plainly stated, there was nothing here on which a reasonable man might fairly conclude guilt beyond reasonable doubt. *United States v. Taylor*, 464 F.2d 240 (2nd Cir., 1972).

At trial DiPalma testified that he first met Gigliotti on May 15th, 1972. According to the witness this meeting occurred several months after a lendor-debtor

substantive evidence had been introduced then, very little prejudice would have existed to the government had a mistrial been declared and another panel selected.

The error was not inadvertent, inasmuch as it did not come out by way of a voluntary response to a question by the witness, but was a specific answer to a specific query by the prosecutor. The only conclusion one can draw is that the prosecutor wanted this piece of information to be known by the jury, and he must be fully charged with the consequences of his act.

[28]*Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457 (1942); *United States v. Tutino*, 269 F.2d 488 (2nd Cir., 1959).

relationship began with defendant Riccardi. There is, prior to this meeting, absolutely no evidence of involvement on Gigliotti's part.

On May 15th, 1972, the witness testified for the first time, Gigliotti was Riccardi's companion. (70-71) DiPalma testified that after Riccardi threatened to put him in the hospital, Gigliotti joined the conversation:

> "A. Ciro Riccardi asked me where have I been. I told him I'd been around. 'I haven't had a chance to come down and see you yet.'
>
> He told me that if I don't get this money up he's going to put me in the hospital where no doctor bills are going to be able to pay for it.
>
> Q. What did you say then?
>
> A. I says, 'Well, I'm having a hard time.'
>
> He says he's having a hard time, too, doesn't want to know about my hard times.
>
> Q. What if anything else did he say?
>
> A. When he said that, the gentleman there with the brown suit [Gigliotti] said, 'Look.' In the words of this, he said, 'it doesn't pay for you to get hurt.' He said, 'Why don't you pay him? or do what you can to pay him?' Then he says, 'Go ahead and go.'
>
> I left that day, went back home." (71)

Following this meeting, DiPalma met with Riccardi on some three occasions when Gigliotti was not present. (72, 73 & 80) Finally, the matter culminated in the June 2nd meeting when Gigliotti was again present. (83) The Government alleged that everything that transpired during this meeting was recorded on tape. Therefore, to judge the extent of Gigliotti's participation we must refer to that recording. By his testimony DiPalma first met Gigliotti on that date. The tape

reflects that fact. The beginning of the tape also reflects a very significant statement made by Gigliotti to DiPalma prior to the time that they joined Riccardi. The transcript of this recording appears in Appellant's Appendix in the record below at pages 402 through 417 and is a part of the record below. On the transcript the fifth statement attributed to Gigliotti is set forth as follows:

> "Talking to you is like talking to nobody. I just hang out here about four or five blocks away." (402)

Cross-examination of Agent Ruffels, however, drew an admission that the transcript was in error.

> "Q. You had occasion, together with all of us,–after all the difficulties were ironed out–to listen to the tape.
>
> A. Yes, sir.
>
> Q. And as a result of listening to it, did you notice that instead of the word, 'you,' it should be the word 'me', and it should read, 'talking to me is like talking to nobody. I just–I hang out here–about four or five blocks away.'
>
> Did you notice that, sir?
>
> A. Yes, sir. I am sorry. I did not.
>
> Q. All right.
>
> Defense Counsel:
>
> Your Honor, with your permission, I request some guidance. I would like at his convenience for him to listen to the tape again, Mr. Ruffels, and I would like to see if it refreshes his recollection with particular reference to that line.
>
> The Court:
>
> We can do that at the recess.

> Defense counsel:
>
> All Right." (134-135)

Later, under re-cross examination trial counsel elicited the following:

> "Q. And your original transcript has on it, 'talking to you is like talking to nobody.' And this is supposed to be Gigliotti talking.
>
> I Just hang out here–about four or five blocks away.'
>
> Right?
>
> A. Right.
>
> Q. And now you listened to it during this recess?
>
> A. Right.
>
> Q. Is your recollection refreshed that instead of 'talking to you,' it should be, 'talking to me is like talking to nobody. I just hang out here–about four or five blocks away.'
>
> A. What specifically would you like me to
>
> Q. Well, should the 'you' be 'me'?
>
> A. Yes.
>
> Q. And that 'me' refers to Ronald Gigliotti telling Frank DiPalma that 'your talking to me about this is like talking to nobody,' right?
>
> A. Yes." (174-175)

Following this statement, the conversation turned to DiPalma's imminent meeting with Riccardi. When DiPalma voiced some reluctance about going with Gigliotti to meet Riccardi, Petitioner stated that

> "Listen–we're not going to no house. He's waiting for you outside. I don't give a fuck. It don't make no difference to me. I'll tell him you can't make it." (403)

When DiPalma stated that he would like to walk to the meeting rather than go with Gigliotti the following was recorded:

"Di Palma: I'll walk up.

Gigliotti: All right, let's see, you want to walk it? I'll tell you which way to go." (404);

When Riccardi finally met DiPalma the conversation immediately turned to the subject of the loan. It does appear from the transcript that Riccardi drew reference to a gun.

> "Z: (Riccardi) You stand right next to him—if he does anything shoot him right in his fucken head—I'm telling you something over here if you'd have come to me like a man and you wouldn't try to hide like a rat—" (407)

As previously stated, however, Gigliotti did not join in this threat nor was there any evidence that he carried a gun. At page 9 of the transcript Gigliotti enters the conversation. There is however, nothing more than plaintiff remarks about DiPalma's failure to repay Riccardi.

There is, then, nothing in DiPalma's testimony or in the taped conversation of June 2nd to support a finding that Gigliotti had a stake in this alleged criminal venture. *United States v. Johnson*, 513 F.2d 819 (2nd Cir., 1975); *United States v. Falcone*, 109 F.2d 579 (2nd Cir., 1940). Considering the evidence in this case, Gigliotti's meetings with DiPalma were shown to be nothing more than fortuitous. On the two occasions in question the Government proved nothing more than that Gigliotti was a companion of Riccardi. In *United States v. Gargulio*, 310 F.2d 249, 253 (2nd Cir., 1962) this Court stated that:

> "yet, even at an age when solitude is so detested and 'togetherness' so valued, a jury could hardly be permitted to find that the mere furnishing of company to a person engaged in crime renders the companion an aider or abettor."

In the instant case, the prosecution established only that Gigliotti was a friend or companion of Riccardi. This was clearly insufficient to support a finding beyond a reasonable doubt, that Gigliotti participated in the crime charged.

V.

THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT DID NOT PROPERLY PROVIDE PETITIONER'S APPELLANT COUNSEL THE OPPORTUNITY TO RESPOND TO THE GOVERNMENT'S APPELLEE BRIEF WHICH WAS FILED ON THE FRIDAY, DECEMBER 5, 1975, BEFORE ORAL ARGUMENT ON MONDAY, DECEMBER 8, 1975, AND SAID FAILURE TO PROVIDE SUCH OPPORTUNITY AMOUNTED TO AN INADEQUATE, UNFAIR APPELLATE REVIEW BELOW.

Appellant counsel for petitioner Gigliotti has refused to submit an affidavit which sets forth the time sequence of the procedures followed below on appeal *re* the filing of the Government brief. However, petitioner's counsel has confirmed the dates argued herein and submits Appendix B as proof thereof. There was a lack of opportunity for counsel for Gigliotti to respond prior to oral argument below.

Rule 31(a), Federal Rules of Appellate Procedure, provides that appellant has forty days to file his initial

brief; that appellee has thirty days thereafter to file its brief; and that appellant then has 14 days to reply to appellee's brief. Where appellee did not file its brief till Wednesday, December 3, 1975, and appellant counsel did not receive a copy thereof till Friday, December 5, 1975, it hardly appears fair that no time was provided appellant to respond. Oral argument was thus had on Monday, December 8, 1975. During the prosecution of a case before a Jury the Government, with its burden of proof, has the right to rebuttal in presenting the evidence and final argument. They never give up said right. Yet, on the instant appeal where petitioner had the burden of proof to cause a reversal of the trial findings, petitioner was denied his right to rebut or reply to the Government brief.[29]

Counsel respectfully submits that petitioner was denied fair treatment at the investigative level, grand jury level, the trial level—by and through his own counsel, the prosecutor and, in part, the court—and the appellate level. Without full review of the instant case by this Court, petitioner will have effectively been denied due process at literally every stop of the judicial process. That would be wrong and it is in that vein that counsel respectfully urges the Court to hear this case.

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[29]Petitioner's appeal counsel could hardly have petitioned for a rehearing by the U.S. Court of Appeals for the Second Circuit as to do so would have offended the very court which failed to protect petitioner's rights under Rule 31(a), F.R. Ap.P.

CONCLUSION

Wherefore, it is respectfully requested that the instant Petition for Writ of Certiorari be granted.

Very Respectfully Submitted,

KENNETH MICHAEL ROBINSON
Pendleton & Robinson
The Judiciary Square
306-6th Street, N.W.
Washington, D.C. 20001

Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing petition for Writ of Certiorari was mailed, postage paid, to Robert H. Bork, Esquire, the Solicitor General, United States Department of Justice, Washington, D.C. 20530 on this 26th Day of January, 1976.

KENNETH MICHAEL ROBINSON

APPENDIX A

IN THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

UNITED STATES OF AMERICA,
Respondent, File No.

-vs.-

RONALD T. GIGLIOTTI,
Petitioner.

AFFIDAVIT OF PETITIONER FOR WRIT OF CERTIORARI

STATE OF NEW YORK)
COUNTY OF RICHMOND) ss.:

I, RONALD T. GIGLIOTTI, do hereby attest and swear that the petition for writ of certiorari filed this day by my counsel in the Supreme Court for the United States of America is filed in good faith and with the firm belief that the issues raised by counsel are issues which should necessitate a reversal of my present conviction before the HON. Judge Platt sitting in the Federal Court for the Eastern District of New York.

Your affiant further swears that he has discussed in great detail each of the issues raised by counsel in this petition and that your affiant believes that he did not receive fair treatment in the Grand Jury presentation by the prosecutor. It is further believed by your affiant that his trial counsel should have raised certain legal defenses which were not raised and that the Court

should have granted certain other motions made by trial counsel for your affiant.

Appellant-counsel for affiant's co-defendant was supposed to have requested an extension of time in which to file the petition for writ of certiorari and neglected to do so. It was only after a misunderstanding on the part of appellant-counsel that your affiant retained counsel who has filed this petition and it is for that reason that said petition is filed out of time.

Affiant pleads that the Court review this petition in order that affiant can be the recipient of due process.

/s/Ronald T. Gigliotti
RONALD T. GIGLIOTTI

Sworn to before me this
20th day of January, 1976.

/s/ [Illegible]
Notary Public.

APPENDIX B

AFFIDAVIT OF PETITIONER'S COUNSEL

I, KENNETH MICHAEL ROBINSON, hereby attest and swear that I was retained by Petitioner Gigliotti during the first week of December, 1975, for purposes of attempting to persuade trial court to reduce eight (8) years imprisonment sentence previously imposed on Petitioner Gigliotti.

As present counsel for Petitioner Gigliotti, I was not to attend to any of the appellate matters and understood that Petitioner Gigliotti and his co-defendant, Riccardi, were to continue to use the services of their appellate counsel in petitioning for Writ of Certiorari to the United States Supreme Court.

I further swear that in a conversation, approximately one week prior to January 8, 1975 (the 30th day from final judgment in the United States Court of Appeals for the Second Circuit), one of the attorneys for Mr. Riccardi advised me that he would attempt to file the appropriate Petition for Writ of Certiorari or in the alternative for an extension of time to file said petition.

Counsel further swears that on Thursday, January 8, 1976, I was advised by Petitioner Gigliotti that no one had attempted to protect Petitioner Gigliotti's rights. Consequently, counsel immediately filed a motion for an extension of time in which to file a Petition for Writ of Certiorari. Mr. Justice Marshall denied said petition on Monday, January 12, 1976.

Counsel has attempted to have appellant counsel for Petitioner Gigliotti file an affidavit stating the sequence in which briefs and responses to said briefs were filed on appeal to the United States Court of Appeals for the

Second Circuit. Appellant counsel has refused to prepare an affidavit. Your affiant, upon said refusal, contacted the Clerk's Office for the United States Court of Appeals for the Second Circuit and confirmed the fact that the Government filed its response brief with the Court on Wednesday, December 3, 1975. A copy of said brief did not reach appellant counsel until Friday, December 5, 1975. Oral argument was had on Monday, December 8, 1975.

Your affiant further swears that this Petition for Writ of Certiorari was filed in good faith because it is believed that the proceedings and not request below are lacking from the beginning of the investigation through the appellate process in protecting Petitioner Gigliotti's rights to fair judicial treatment.

This Petition for Writ of Certiorari is not filed for purposes of delay or for purposes of continuing Petitioner Gigliotti on bond.

/s/Kenneth Michael Robinson
KENNETH MICHAEL ROBINSON

WASHINGTON)
: ss
DISTRICT OF COLUMBIA)

I HEREBY CERTIFY, that on this Twenty-second day of January, 1976, before me, the subscriber, a Notary Public of the State aforesaid, personally appeared KENNETH MICHAEL ROBINSON, who made oath in due form of law that the matters and facts set forth in the foregoing Affidavit are true to the best of his knowledge, information and belief.

As witness my hand and Notarial Seal.

/s/Lynn Kathleen Beal
NOTARY PUBLIC

My Commission Expires:
My Commission Expires November 30, 1980

SECOND CIRCUIT

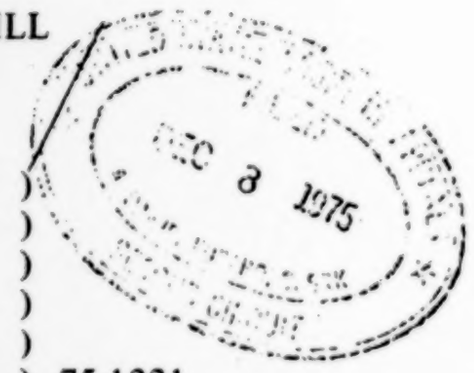
At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of December one thousand nine hundred and seventy-five.

Present: HON. IRVING R. KAUFMAN
Chief Judge

HON. J. JOSEPH SMITH

HON. THOMAS J. MESKILL

Circuit Judges,



United States of America,)
)
Plaintiff-Appellee)
v.)
)
Ciro R. Riccardi, Ronald Giglioppi,) 75-1331
) 75-1332
Defendants-Appellants.)

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk
by /s/ Vincent A. Carlin
Chief Deputy Clerk

No. 75-1062

In the Supreme Court of the United States

OCTOBER TERM, 1975

RONALD GIGLIOTTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1062

RONALD GIGLIOTTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that (1) the evidence at trial was insufficient to support his conviction, (2) the evidence before the grand jury was insufficient to support his indictment, (3) the statement of an F.B.I. agent that he was assigned to the Bureau's Organized Crime Division denied petitioner a fair trial, (4) the trial court erred in not ordering a severance *sua sponte*, and (5) petitioner's counsel rendered ineffective assistance by not moving for a severance at trial.

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner and co-defendant Ciro Riccardi were convicted of collecting and attempting to collect an extension of credit through the use of violence and threats of violence, in violation of 18 U.S.C. 894. Petitioner was sentenced to eight years'

imprisonment, subject to the parole eligibility provisions of 18 U.S.C. 4208(a), and fined $10,000. The court of appeals affirmed on December 8, 1975. On January 12, 1976, Mr. Justice Marshall denied an application for extension of time in which to file a petition for a writ of certiorari. The petition was filed on January 26, 1976, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court. In any event, there is no reason to grant the petition.

The evidence at trial showed that in May 1971 co-defendant Ciro Riccardi agreed to make a $1,000 loan to Frank DiPalma, in return for which DiPalma was required to pay $50 "vig" (interest) each week until the principal was repaid (Tr. 19-22, 207-209, 218, 221). For approximately three months DiPalma made the weekly interest payments. He then obtained another $1,500 loan from Riccardi with a weekly interest rate of $125. Subsequently, as DiPalma's financial condition deteriorated, he obtained another $1,000 loan from Riccardi with a weekly interest rate of $175 (Tr. 23-28). For several months DiPalma met the $175 weekly interest payments (Tr. 33).

In November or December 1971, DiPalma informed Riccardi that he was having difficulty making the $175 payments. Riccardi agreed to renegotiate the loan upwards from $3,500 to $4,800 and to lower the weekly payments to $100 to be applied against the principal rather than as interest. When DiPalma stated that he would have trouble repaying even $100 a week, Riccardi remarked: "your head will get busted; your legs will get broken" (Tr. 397-400).

By the spring of 1972 DiPalma became unable to meet the weekly interest payments (Tr. 37-38). Riccardi several times went to DiPalma's home and threatened him with bodily injury if he continued not to repay his debt (Tr. 449-452). On one occasion, DiPalma was confronted near a cemetery by a car occupied by Riccardi and petitioner

(Tr. 40, 402-403). Riccardi warned DiPalma that if he was not paid he would put DiPalma in the hospital, and petitioner told DiPalma (Tr. 41):

> Look * * * [i]t doesn't pay for you to get hurt. * * * Why don't you pay him? [sic] or do what you can to pay him?

Approximately two days after this incident DiPalma tried to stall for time by giving Riccardi a bogus $900 check (Tr. 42).

On May 17, 1972, DiPalma went to the police and described his dealings with Riccardi (Tr. A31-A32, 43-47). A few days later DiPalma agreed to cooperate with the Federal Bureau of Investigation in its investigation of the extortion scheme. On June 2, 1972, DiPalma, equipped with a concealed listening device and under the surveillance of F.B.I. agents (Tr. A94-A95, 52-53), met with petitioner, who toid DiPalma where he was to meet Riccardi (Tr. 53-54, 64-65). After DiPalma walked to the specified location, petitioner and Riccardi drove up. Riccardi instructed petitioner, with reference to DiPalma (Add. 6; C.A. App. 407):[1]

> Ronnie, you stand right next to him—if he does anything shoot him right in his fucken [sic] head.[2]

---

[1]"Add." refers to the addendum to the government's brief on appeal, which contains an accurate version of the transcript of the tape-recorded conversation among petitioner, Riccardi and DiPalma, copies of which were furnished to the jury when the recording was played at trial. The transcript of the recording in petitioner's appendix on appeal (C.A. App. 402-417) contains material inaccuracies (see n. 2, *infra*). Copies of the government's brief on appeal and the appendix filed by petitioner in the court of appeals are being lodged with the Clerk of this Court.

[2]Petitioner's appendix (C.A. App. 407) omits Riccardi's direct reference to petitioner as "Ronnie."

Riccardi and petitioner then demanded the money DiPalma owed Riccardi and warned DiPalma that he would be better off dead if he did not pay it and that he was looking to die (Add. 8, 13, 16; C.A. App. 410, 414, 416). Riccardi also told DiPalma that his reluctance to get in their car would not save him because "[i]f anything we'll come and get you in the street * * * " (Add. 8; C.A. App. 409).

1. Petitioner contends (Pet. 42-47) that the evidence at trial was insufficient to support his conviction, that his meetings with DiPalma "were shown to be nothing more than fortuitous," and that the evidence "proved nothing more than that [petitioner] was a companion of Riccardi" (Pet. 46). Viewed in the light most favorable to the government, *Hamling* v. *United States*, 418 U.S. 87, 124, the evidence of petitioner's presence with Riccardi on several crucial occasions, his threats to DiPalma to persuade him to pay the debt to Riccardi, and his other words and actions showed that petitioner was not merely an innocent bystander and were sufficient to convict petitioner as an aider and abettor. See *Nye & Nissen* v. *United States*, 336 U.S. 613, 619; *United States* v. *Ragland*, 375 F.2d 471, 478 (C.A. 2), certiorari denied, 390 U.S. 925.[3]

2. Petitioner contends (Pet. 22-38) that the grand jury that indicted him had no evidence of his participation in the scheme to extort money from DiPalma. The record indicates, however, that DiPalma twice testified before the grand jury and fully related the details of Riccardi's and petitioner's involvement in the crimes charged. Although DiPalma could not identify petitioner by name in

[3]An aider and abettor under 18 U.S.C. 2 may properly be charged as a principal. See *United States* v. *Tropiano*, 418 F.2d 1069, 1083 (C.A. 2), certiorari denied, 397 U.S. 1021; *United States* v. *Aldridge*, 484 F.2d 655, 661 (C.A. 7), certiorari denied *sub nom. Good* v. *United States*, 415 U.S. 921.

his grand jury appearances, that identification was established by the F.B.I. through surveillance photographs taken during the June 2, 1972 meeting and was furnished to the grand jury by the government attorney (C.A. App. 394-400).

Although this identification was hearsay, "[t]he grand jury's sources of information are widely drawn, and the validity of an indictment is not affected by the character of the evidence considered." *United States* v. *Calandra*, 414 U.S. 338, 344-345. See also *Costello* v. *United States*, 350 U.S. 359, 362 ("Grand jurors * * * [are] free to make their presentments or indictments on such information as they deem satisfactory"). Here, the prosecutor informed the grand jury of the hearsay nature of the evidence and asked if it wished to question the agent who had made the identification, but the grand jury indicated that further inquiry was unnecessary (C.A. App. 395-396, 398-399).[4]

3. Petitioner's contention (Pet. 38-42) that he was denied a fair trial because of the statement that an F.B.I. agent was assigned to the Bureau's Organized Crime Division is insubstantial. In response to a question on direct examination about his assignment in May 1972, Special Agent Arthur Ruffels stated that he had been assigned to the F.B.I.'s Organized Crime Division.[5] Although the

[4]There is no requirement that remarks of a prosecutor before the grand jury be recorded, *United States* v. *Peden*, 472 F.2d 583 (C.A. 2), or, for that matter, that any proceedings before the grand jury be transcribed. *United States* v. *John*, 508 F.2d 1134 (C.A. 8), certiorari denied, 421 U.S. 962; *United States* v. *Heck*, 499 F.2d 778 (C.A. 9), certiorari denied, 419 U.S. 1088; *United States* v. *Cramer*, 447 F.2d 210, 214 (C.A. 2), certiorari denied, 404 U.S. 1024.

[5]The record contains no support for petitioner's assertions (Pet. 41, n. 27) that the statement was a "deliberate reference to petitioner" or that it was deliberately intended to prejudice him. The general nature of the prosecutor's question does not indicate an intent to elicit the specific response given by the agent.

trial court denied petitioner's motion for a mistrial, it immediately gave the jury the following cautionary instruction (Tr. A81-A82):

> Ladies and gentlemen, the fact that this witness may be assigned to one unit or another of the FBI is not material to your consideration of this case. I permitted him to answer the question and I see no harm in his answer as such. He is a member of the FBI. And various members of the FBI are assigned to one unit or the other. But that isn't the question for your determination.
>
> Your function is to determine whether or not a crime had been proved in this particular case and whether that crime was committed by these defendants. And not to what division this witness may or may not have been assigned at a particular time.

Not only must it be assumed that the jury observed these admonitions in determining petitioner's guilt, see *Shotwell Manufacturing Co.* v. *United States,* 371 U.S. 341, 367, *Opper* v. *United States,* 348 U.S. 84, 95, but also the jury's acquittal of Riccardi on one count of the indictment indicates that it conscientiously weighed the evidence unaffected by irrelevant considerations.

4. Petitioner claims (Pet. 15-22) that the trial court erred in not ordering a severance *sua sponte* and that his trial counsel rendered ineffective assistance by not moving for a severance. Since neither of these issues was raised in the district court or the court of appeals, they are not now properly before this Court. *Adickes* v. *Kress & Co.,* 398 U.S. 144, 147, n. 2; *Lawn* v. *United States,* 355 U.S. 339, 362-363, n. 16.

In any event, petitioner's contentions are baseless. Petitioner asserts that a severance was required because "[a]ny implication of petitioner came solely through the incriminating evidence introduced against * * * Riccardi"

and that "only Riccardi knew of any involvement by petitioner and Riccardi would have given exculpatory evidence of petitioner but for joinder of the two defendants" (Pet. 16). To the contrary, the record shows that the evidence against petitioner was substantial and that petitioner's involvement was directly testified to by DiPalma and was corroborated by F.B.I. surveillance and tape recordings. Furthermore, there is not the slightest reason to believe that Riccardi would have waived his Fifth Amendment privilege against self-incrimination and would have testified for petitioner at a separate trial, much less that Riccardi's testimony would have exculpated petitioner.

Considerations of judicial economy and the public interest underlie the settled principle that defendants jointly indicted should be tried together except for the most compelling reasons. *United States* v. *Isaacs,* 493 F.2d 1124, 1159 (C.A. 7), certiorari denied, 417 U.S. 976; *United States* v. *Hines,* 455 F.2d 1317, 1334 (C.A. D.C.), certiorari denied, 406 U.S. 975; *Parker* v. *United States,* 404 F.2d 1193 (C.A. 9), certiorari denied, 394 U.S. 1004. In light of this record, the failure of the trial court to order a severance *sua sponte* or of defense counsel to request a separate trial for petitioner was not erroneous. See *United States* v. *Donner,* 497 F.2d 184, 195 (C.A. 7).[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.

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[6]Petitioner also asserts (Pet. 47-48) that he was denied the opportunity to file a reply brief in the court of appeals because the government's brief was not filed until December 3, 1975, and was not received until December 5, 1975, three days before oral argument. The order of the court of appeals, a copy of which is being lodged with the Clerk of this Court, required the government to file its brief by December 1, 1975. The certificate of service indicates that the brief was mailed to petitioner's counsel on November 28, 1975.